

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR-02-606(FB)

Plaintiff, :

- against - : United States Courthouse
Brooklyn, New York

PETER GOTTI, et al., :
December 20, 2002

Defendant. : 3:00 PM

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TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: ROSLYNN R. MAUSKOPF
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Proceedings recorded by computerized stenography.
Transcript produced by Computer Aided Transcription.

1 For the Defendants:

2
3 GERALD SHARGEL, ESQ.

4 SARITA KEDIA, ESQ.

5 LESLIE DUBIOS, ESQ.

6 (For P. Gotti)

7
8 GEORGE SANTANGELO, ESQ.

9 (For A. Ciccone)

10
11 JOSEPH CORROZZO, ESQ.

12 (For R.V. Gotti)

13
14 RICHARD WARE LEVITT, ESQ.

15 (For P. Cassarino)

16
17 GERALD SHARGEL, ESQ.

18 (For J. Brancato)

19
20 HARRY BATCHELDER, ESQ.

21 (For R.G. Gotti)

22
23 RICHARD MEDINA, ESQ.

24 (For R. Bondi)

25

1 THE CLERK: Criminal cause for a status conference,
2 United States of America versus Peter Gotti, et al.

3 I ask the parties if you can state your
4 appearances, for the record.

5 MR. GENSER: Andrew Genser for the Government.
6 Good afternoon, your Honor.

7 MS. JESTIN: Katya Jestin for the government.

8 THE COURT: If you would be kind enough, I am going
9 to ask you to tell the Court who is here for the defendants,
10 Mr. Shargel.

11 MR. SHARGEL: Yes, your Honor. I am of course
12 standing before you on behalf of Peter Gotti, with my
13 associate, Leslie Dubios.

14 Mr. Santangelo is here representing Anthony
15 Ciccone.

16 MR. SANTANGELO: Mr. Mitchell is always here.

17 MR. SHARGEL: Yes. John Mitchell as well.

18 Joseph Corrozzo represents Richard V. Gotti.

19 Rich Levitt is here, represents Primo Cassarino.

20 I am standing in on behalf of Mr. Tacopina this
21 afternoon because he was out of the district, for Jerome
22 Brancato.

23 Rich Gotti is here represented by Harry Batchelder.

24 Richard Bondi is here represented by Rich Medina.

25 THE COURT: I appreciate that. No slight to any of

1 the fine array of attorneys here. I think I can call upon
2 Mr. Shargel to do some administrative work for the Court, to
3 move things along.

4 We have a lot of things to talk about today.
5 What's the right order of priority?

6 I guess the first thing we ought to talk about is
7 how you folks have progressed with the jury questionnaire.

8 Why don't you report to the court first,
9 Mr. Genser.

10 MR. GENSER: Judge, actually, if the Court wouldn't
11 mind, I defer to Mr. Shargel on that.

12 THE COURT: All right. Mr. Shargel.

13 MR. SHARGEL: The parties have spoken. Your Honor,
14 apparently, there is more time that is needed to deal with
15 the question of the jurors that should be agreed upon to be
16 stricken for cause. We are ready. We have our list. I am
17 prepared to give our list to the government this afternoon.
18 I could even supply the list to the Court. Then, later this
19 week or early next week we will have a full report for your
20 Honor.

21 THE COURT: You need a little more time. You are
22 making satisfactory progress?

23 MR. SHARGEL: We definitely are. As I said, I have
24 the list right here.

25 THE COURT: What I am contemplating doing, just to

1 give you all a heads up in terms of how we are going to
2 process the selection of the jury, it will be something like
3 this.

4 I will be here next Monday, Tuesday, and Thursday
5 at your disposal. For sure we have to come to rest with the
6 number of qualified jurors who will be subject to be in
7 summons for potential selection come January 6th.

8 Maybe I should put this down for Tuesday for that
9 purpose.

10 MR. SHARGEL: The only problem with Tuesday, Judge,
11 is that obviously -- That's Christmas Eve.

12 THE COURT: I am open to discussions.

13 MR. SHARGEL: I suggest -- let me canvass the
14 array.

15 THE COURT: I could do it Thursday. That is the
16 best.

17 MR. SHARGEL: Here is what we'll do. Since I am of
18 the Hebrew persuasion, as you might know, I can be here on
19 Tuesday representing -- if the defendants are excused,
20 because this is really just roll up your sleeves and work on
21 what the challenges are. If the defendants are excused and
22 if certain counsel are excused, those counsel that are
23 excused I will stand in for. This is a selective effort so I
24 won't have the authority to speak on behalf of every
25 defendant. We can do it on Tuesday.

1 THE COURT: There is going to be a joint selection
2 process. As long as everybody here agrees to allow me to
3 meet with the government attorney and Mr. Shargel on Tuesday
4 to hear whatever problems you may have in terms of the jury
5 questionnaire scenario, we can proceed on that basis.

6 Anybody have any problems with that.

7 MR. CORROZZO: No, your Honor, with the
8 understanding also that the defendants will be excused.

9 THE COURT: Yes.

10 MR. GENSER: We can be here Tuesday morning. I
11 would ask if we could do it possibly in the morning because
12 there are travel issues later in the day.

13 THE COURT: Let's look at 10:00.

14 MR. SHARGEL: That is fine.

15 THE COURT: We have to get that done because I am
16 told by the people in charge of making copies of things they
17 have to have everything as soon as possible to do the
18 necessary ministerial work to get everything in order. We
19 will be able to attend to that Tuesday.

20 MR. SHARGEL: I would like alert your Honor to the
21 fact from our side there is a substantial number. I think we
22 will have no problem with this very theory ultimately, or I
23 hope there is no problem ultimately. I want to alert you to
24 the fact there are a substantial number of jurors where it
25 seems obvious that calling them back would be fruitless.

1 THE COURT: You compile it. Discrete lists. I
2 will make my calls on it. We'll try to get it done with
3 Tuesday. If not, I will finish it up on Thursday. We will
4 use next week for that purpose.

5 MR. SHARGEL: Fine. I have a catalog. It is not a
6 long catalog. I have a number of housekeeping issues in
7 order to get this case trial ready. I would like to put them
8 before your Honor, if I may. I would like to deal with them
9 before your Honor goes away. I would like to deal with them
10 in the presence of all counsel and defendants.

11 THE COURT: We are here to spend whatever time is
12 needed today to take care of a host of things. I have these
13 motions I want to address as well. Couple of other thoughts
14 on my mind.

15 Before we engage in that colloquy, let me just
16 return to the jury selection process.

17 Here is what I plan to do. Each of my colleagues
18 does it a little differently but this is what I am most
19 comfortable with doing, and I invite your suggestions if you
20 have any issues with what I am about to propose.

21 On January 6, I plan to summon 80 perspective
22 jurors to court based upon what comes out of the
23 questionnaire process. Then, instead of questioning each one
24 individually, which I think is tedious and not necessarily,
25 you know, economical in terms of the effective use of our

1 time, I am going to have waves of seven come into the
2 courtroom at a time. We'll question those seven
3 collectively.

4 If, you know, something happens untoward, we'll
5 lose seven jurors. I don't think there is a great risk here
6 that we are going to have a problem if I take seven at a
7 time. The others will be kept outside of the courtroom and
8 we'll bring in seven subsequent panels, so to speak, as we
9 address each of these panels in turn.

10 Then I will ask some questions which will give you
11 folks the opportunity to hear them speak which is important.
12 At that time, I will also solicit whatever specific questions
13 you would like me to post to those individual jurors. I
14 think that can be handled okay.

15 We're going to then proceed until we qualify the
16 requisite number to spread throughout the courtroom on the
17 6th of January for exercise of the challenges.

18 MR. SHARGEL: If I may. I probably have gone
19 through this process --

20 THE COURT: You have done it more than I have.

21 MR. SHARGEL: -- a lot of times.

22 I know that you want to do it as expeditiously as
23 possible. I know, also, you have discretion to do it in any
24 way you choose fit.

25 Please let me tell you that when we have a

1 questionnaire such as the questionnaire we have here, this is
2 a questionnaire that's been used in this district before in
3 substantial part. The problem is it delves into opinions
4 about government cooperators, about the subjects that will be
5 raised at trial, and allegations of organized crime.

6 It has been my experience that when a prospective
7 juror is asked follow-up questions on what they've said in
8 the questionnaire -- I am not talking about the people that
9 obviously have been disqualified with expressions of blatant
10 prejudice. When the following is done, it will be -- there
11 are two problems as I see it.

12 THE COURT: You think I have to do it one by one?

13 MR. SHARGEL: Everyone has done it by one by one.

14 I know that Judge Korman, Judge Trager -- I could
15 name every judge in the courthouse. Everybody has done it
16 one by one because necessity dictates that.

17 Your Honor, I don't want to be the profit of gloom
18 but I think if your Honor starts it the way that you suggest,
19 it is going to take more time in the end. I know that
20 Mr. Genser has been through this with me on a trial before.

21 THE COURT: It just seemed to me I could handle a
22 couple at a time.

23 What do you think?

24 MR. GENSER: I think, as a practical matter, even
25 if you have seven seated in the jury box, it is going to turn

1 out to be individual questioning anyway. Given the risk of
2 something being said that affects somebody else, if we are
3 going to end up in that situation -- I haven't done it as
4 many times as Mr. Shargel but I have done it a few times. It
5 has been the one on one. I think we can do it quickly. I
6 would tend to agree that's the issue.

7 THE COURT: I will do it one by one. I was
8 thinking of a way of probably moving the process along a
9 little more expeditiously than that.

10 I thought hard about it.

11 MR. GENSER: We could try it.

12 MR. SHARGEL: I strongly suggest the one by one.
13 There is a reason why everyone in the Southern District,
14 everyone in the Eastern District has done it this way. I
15 respect innovation.

16 THE COURT: Can I place my own unique imprimatur on
17 the process.

18 MR. SHARGEL: I am just concerned we are going to
19 run into a problem.

20 THE COURT: You don't want a copy-cat judge, do
21 you?

22 MR. SHARGEL: No, I never wanted that.

23 THE COURT: All right. We'll do it one by one.
24 Nobody has raised a question of whether anybody wants
25 additional peremptory challenges?

1 MR. SHARGEL: That is something I wanted to raise
2 with you.

3 THE COURT: Let's do that now. Maybe
4 Mr. Santangelo would like to stand next to you.

5 MR. SANTANGELO: I will let Mr. Shargel handle it.

6 MR. SHARGEL: I welcome anyone.

7 Under the rule we're afforded ten, government six.
8 Under the rule we have the opportunity to ask for additional
9 challenges.

10 THE COURT: You want additional challenges?

11 MR. SHARGEL: We would like, if it pleases the
12 Court, one additional challenge for each one of the
13 defendants.

14 THE COURT: I don't know whether I can give you
15 that much. If I do that, I would balance it out by giving
16 the government some additional challenges. That requires
17 consent.

18 MR. SHARGEL: The rules says --

19 THE COURT: I can condition your request on your
20 consenting to the government being given some additional
21 challenges also.

22 Why don't you talk to each other.

23 MR. SHARGEL: 15 seconds.

24 MR. SHARGEL: We are not going to consent, and say
25 10 and 6.

1 THE COURT: Absent consent.

2 MR. SHARGEL: That is correct.

3 THE COURT: It may not be reversible error but I
4 don't want to deal with it on that basis. Let's stay
5 10 and 6.

6 When we qualify people we'll have them all in the
7 courtroom, and then you'll make peremptory challenges against
8 the group of 28, and we'll be left 12 jurors.

9 MR. SHARGEL: Assuming six alternates, we need 40.

10 THE COURT: We have some chase. My thinking is
11 first get the jury and then we'll go through the process with
12 the alternates.

13 I think it is easier because you are dealing with
14 28, which is enough. We'll do the alternates after that.
15 Sometimes we even get agreement on the alternates from a
16 group of 28. We'll see about that.

17 We're pretty much squared away with that. I guess
18 it will take us a few days to go through that selection
19 process.

20 Let's move that to one side. Let's hear your
21 housekeeping concerns. We'll see whether they might coalesce
22 with some of my concerns.

23 One, I alerted your Honor to the fact that we're
24 having some difficulty with the 3500 material. Following the
25 letter I submitted to your Honor, the government has agreed,

1 and I think you got a letter reflecting this, from our
2 office, that the government has agreed to bear the cost of
3 coping the 3500 material. That's not the problem.

4 The problem is, the government has chosen a method
5 of producing the 3500 material that is somewhat unorthodoxed.
6 That is, at the time they think the 3500 material should be
7 produced, it is produced. Instead of being produced to the
8 defendants, it is produced to First Choice Copy. After the
9 government in this case, in this first wave of 3500
10 material -- I didn't mean to say in this case -- in the first
11 wave of 3500 material, after the government gave First Choice
12 Copy the green light to give us the 3500 material, I waited
13 nearly a week to get the material. That's just unacceptable.
14 It is like in the case where the government is not producing
15 all the 3500 material at once and is choosing to produce it
16 in waves.

17 At the time that it is going to be produced, we
18 need to have it and have it that day .

19 THE COURT: How much have you received?

20 MR. SHARGEL: We received two witnesses. One is an
21 expert witness with prior testimony, Agent Hagerty, with
22 prior testimony. Another is a cooperating witness named
23 Michael D'urso with a good amount of 3500 material. A couple
24 thousand pages, I would estimate, and to get this delayed --
25 the statute is specific. The Jencks case is specific. The

1 government has to produce it. If they know that they were
2 going to produce something next Monday, it is not give it to
3 First Choice next Monday. Give it to the defendants next
4 Monday. We'll come down here and pick it up.

5 THE COURT: Mr. Genser, what is going on here?

6 MR. GENSER: Judge, the statute says that we don't
7 have to produce 3500 material until after the witness
8 testifies.

9 THE COURT: We know that. I am just going to
10 adjourn the case and we are going to wait for weeks before we
11 start the trial. We all understand in the realistic world
12 that it is not going to happen that way.

13 MR. GENSER: Judge, as Mr. Shargel alluded to,
14 there was a voluminous quantity of copying that needed to be
15 done. Our office just didn't have the resources to do it.
16 We out-sourced it to First Choice.

17 THE COURT: There is nothing wrong with that. The
18 problem is counsel is not getting the material --

19 MR. GENSER: It seems like he has received it. It
20 is still several weeks before any witnesses are going to
21 testify.

22 THE COURT: Give me a realistic sense of what we
23 are talking about. How much more has to be delivered, really
24 delivered to counsel?

25 MR. GENSER: To the extent that we have witnesses

1 that don't have that volume of 3500 material, we'll do the
2 copying in-house and send it directly to the defense. To the
3 extent it is too much for us to handle in-house, we'll
4 out-source and endeavor to do it so that there is sufficient
5 lead time so that they get it when we would otherwise have
6 turned it over.

7 THE COURT: You are going to have expedite your
8 efforts. What I will do, I have no way of really micro-
9 managing this nor do I have the inclination to do that. This
10 is the type of thing which rely upon the good faith efforts
11 of professional counsel.

12 If there is a snag, then I am just going to hold up
13 the start of the trial. I will let you know right now. I
14 can't make that judgment as I sit here today. That will be
15 the consequence.

16 MR. SHARGEL: Keep in mind that's what they want.

17 THE COURT: Not a question of fault.

18 MR. GENSER: Absolutely, Judge. We turned this
19 material over. I think at the time we turned it over, it was
20 more than a month before trial was going to start. We are
21 endeavoring to get this stuff to them.

22 THE COURT: You made available to the defendant, I
23 understand from what I hear, there is a need for First Choice
24 to reproduce this. It takes a period of time. I am not
25 suggesting you acted in bath faith. I am saying we have to

1 realistically effectively do better.

2 MR. SHARGEL: One more thing. It has been my
3 experience with the prosecution in this district and in fact,
4 with Mr. Genser. I don't see why it should be a problem what
5 I am about to suggest.

6 Obviously we don't then have a witness list in the
7 case. Obviously there are going to be other cooperating
8 witnesses. If history is any teacher, we can expect there
9 will be cooperating witnesses who have testified in other
10 trials. We're talking about hundreds if not sometimes
11 thousands of pages. Right now I can have no complaint
12 because Mr. Genser appropriately points out that we have a
13 fair amount of time before Mr. D'Urso takes the stand and
14 there's adequate time to review the material.

15 I cannot get 3500 material in a carton on a Monday,
16 and have the government say, it won't be two weeks -- two
17 weeks will go before that witness appears. In the middle of
18 trial, your Honor knows full well I can't spend time reading
19 thousands of pages.

20 THE COURT: I understand that. Unless you clone
21 yourself you are not going to be able to do both chores at
22 the same time.

23 MR. SHARGEL: Correct.

24 THE COURT: Be mindful of that.

25 MR. GENSER: We will.

1 MR. SHARGEL: I would think those witnesses who are
2 cooperating witness with the Witness Protection Program,
3 there is no reason it can't all be turned over now.

4 THE COURT: Let's do that this week if you can do
5 that.

6 What will happen is, rather than to put counsel in
7 this impossible position of having to employ full energies
8 and mental capacities to deal with the case as it is
9 unfolding and at the same time have to review voluminous
10 documents, even though the witness may not be called for two
11 weeks, I am not going to put them in that type of position.
12 I will adjourn the trial to give them the opportunity to
13 spend whatever time they need to review that material. That
14 is the fairest thing to do. I can only do one thing at a
15 time.

16 MR. GENSER: As Mr. Shargel acknowledges, he is
17 raising issues but also acknowledging we have responsively
18 turned the material over to him sufficiently in advance. We
19 are going to continue to do that.

20 THE COURT: I will monitor this thing and I am just
21 giving you a word of caution that I will not hesitate to send
22 the jury home after the trial starts for some indeterminable
23 period of time if I find defense counsel is being
24 overburdened with the need to be able to absorb large volumes
25 of papers.

1 MR. GENSER: Understood.

2 THE COURT: Act accordingly.

3 MR. SHARGEL: Next item. We're requesting the
4 Court order the government to supply in the next several days
5 or a week at most --

6 THE COURT: John Does.

7 MR. SHARGEL: No, I am not there.

8 A document list, a list of documents they intend to
9 introduce in their chase in chief. I am not suggesting they
10 are bound by the list or they can't add a document. It will
11 be necessary for the orderly trial process to have copies of
12 the documents that they are going to introduce in their chase
13 in chief. We've gotten many, many documents. We have no
14 idea what they are actually putting in now. To have those
15 exhibits premarked so if an exhibit is offered -- let's think
16 about the practicalities of it. If an exhibit is offered, we
17 have to go on an easter egg hunt to find the exhibits. All
18 counsel have to get together, could I see a copy, could I see
19 a copy. It will take forever to get a document in evidence.

20 The government should prepare the universe of
21 documents it intends to introduce, mark the documents and
22 deliver those documents to the defense. This way when they
23 say Government Exhibit 75, everyone at the table will know
24 what Government 75 is.

25 THE COURT: Makes perfect sense. I usually get an

1 exhibit list in advance of the trial. I would like to have
2 this significantly in advance of this trial because of the
3 obvious numerosity of people and personalities. I think you
4 could accommodate me and defense counsel as well in that
5 respect.

6 MR. GENSER: Yes, Judge. We're preparing our
7 documents and marking our exhibits and compiling our lists
8 and we are going to turn them over just as soon as we can.
9 We expect that to be soon.

10 THE COURT: Give me a little more specifics than
11 that.

12 MR. GENSER: We are going to try and do it this
13 coming week. That's more specific.

14 THE COURT: I could hopefully have a list from you
15 by the end of this week.

16 What do you anticipate in terms of the number of
17 actual documents you want before the jury?

18 MR. GENSER: I don't think it is going to be a
19 document-intensive case, judge.

20 THE COURT: It doesn't sound like that to me. You
21 have a list of tapes and transcripts already in place for
22 that. You could turn that over specifically, I guess, right?

23 MR. GENSER: Judge, we have turned over as...

24 THE COURT: I call it the ones you plan to use.

25 MR. GENSER: What we have done is turned over a set

1 of excerpted transcripts that include those that we intend to
2 use. We're still in the process of narrowing that down. We
3 hope to narrow it down further.

4 THE COURT: Do that. I am also interested in my
5 capacity to hopefully intelligently manage the trial by
6 having a chance to look at those excerpts in advance of the
7 trial too.

8 So you serve dual purposes. One, fairness to the
9 defense counsel and fairness to the Court. Get them as
10 quickly as you can. Try to move the process along by having
11 those documents which you have come to peace with identified
12 and transmitted to me by the end of next week. Counsel as
13 well, of course. At least we'll be moving along in that
14 process.

15 MR. GENSER: Judge, I think we can accelerate the
16 process if we are permitted to do it sort of in waves. In
17 other words, what we have ready we can do. It may take a
18 little while longer to get to the final list as it were for
19 what we are going to be using towards the end of the trial.

20 THE COURT: I will have a sense as to whether the
21 government is making its best good faith efforts in terms of
22 doing common sense things. Let's have a good wave come in a
23 few days.

24 MR. GENSER: Let me assure the Court we're not
25 holding back on anything.

1 THE COURT: It is not --

2 MR. GENSER: Doing as best we can.

3 THE COURT: I am not casting blame on you. I am
4 just practically managing the case in a sensible way. Don't
5 really feel that you have to be defensive or suggesting
6 anything other than good faith on the part of the government.
7 Notwithstanding good faith, certain things have to be
8 accomplished in order to have an orderly effective trial.
9 That's all I am telling you.

10 MR. GENSER: Thank you, judge.

11 THE COURT: Let me see good progress by the end of
12 next week.

13 MR. SHARGEL: Judge, with all respect, I don't
14 think that is workable when it comes to the tapes and the
15 transcripts. I think that the defense needs to know before
16 the trial starts or at the time the trial starts what tapes
17 the government is going to introduce in its case in chief.

18 THE COURT: I think that's a fair request.

19 MR. SHARGEL: I want to give you another reason, if
20 I may. There may be evidentiary objections that should be
21 made in limine. It is impossible to do that if we are going
22 to be told a day before or two days before tapes are going to
23 be played.

24 THE COURT: This is not going to happen that way.
25 Mr. Genser is not suggesting that either. The conversation

1 we're having right now is somehow general. We'll get more
2 focused and specific if needs be. For present purposes we
3 understand each other.

4 I expect to see a lot of things happening next
5 week. Try by the end of Thursday because I am going to be
6 away the following week. This way I will have some reading
7 material to take with me to Puerto Rico.

8 MR. SHARGEL: As a practical matter with regard to
9 the transcripts the government is going to be producing,
10 could we have that sent directly to the defense rather than
11 First Choice?

12 THE COURT: That part you could send directly to
13 them I am sure.

14 MR. GENSER: All right, judge.

15 THE COURT: Also, you are going to want to husband
16 your energies because you want to be effective before the
17 jury. You don't want to overburden them and things of that
18 nature. After a while sometimes it becomes counter
19 productive in terms of the juries impatience. You want to
20 make an effort to help the jury as well.

21 Okay.

22 MR. GENSER: Yes.

23 MR. SHARGEL: There is only one point I have. Your
24 Honor received, I think the day before yesterday, on
25 Wednesday, the government's motion which was titled 404(b) to

1 admit certain evidence pursuant to 404(b) and other in limine
2 application.

3 THE COURT: I hadn't seen that before yesterday.

4 MR. SHARGEL: I want to answer that in writing. I
5 want until January 6, perhaps or even the week after.

6 THE COURT: I have a lot of material to deal with
7 here today. When did you send the 404(b) letter to me?

8 MR. SHARGEL: Wednesday.

9 MR. GENSER: I think it was one week ago.

10 MS. JESTIN: I think Monday.

11 MR. GENSER: It was Monday, yes.

12 MR. SANTANGELO: I got it Tuesday.

13 THE COURT: I am glad you told me that because I --

14 MR. GENSER: I believe it was hand delivered to
15 Mr. Shargel on Monday afternoon and FedExed to the rest of
16 defense counsel on Monday and hand delivered to your Honor's
17 chambers on Monday.

18 THE COURT: We'll find it.

19 MS. JESTIN: Let us know if you can't find it.

20 THE COURT: Just double-check. I have my law
21 clerk here, so I am going to tell them right now: Find the
22 404(b) letter as quickly as you can. Okay.

23 How much time do you need? You said until January
24 6?

25 MR. SHARGEL: We have a lot deal with. I am going

1 to ask for the end of that week. I don't think actually --
2 mid-week January 8th.

3 THE COURT: Try to flush it out during the jury
4 selection week. Of course you can have until, what, January
5 8?

6 MR. SHARGEL: January 8.

7 THE COURT: Anything else.

8 MR. SHARGEL: That's all I have.

9 THE COURT: From the government's perspective, any
10 administrative matters you want to address?

11 MR. GENSER: Just to the extent the defense has
12 documents or exhibits they intend to be offering, we have not
13 received any reciprocal discovery whatsoever. I would ask
14 for the same consideration.

15 MR. SHARGEL: We understand our obligation under
16 Rule 126, and we will comply.

17 THE COURT: Fair enough.

18 MR. GENSER: I am not sure if that is exactly what
19 I asked for.

20 MR. SHARGEL: With the same consideration.

21 THE COURT: I will be monitoring it all. All
22 right.

23 So far so good.

24 Now we have a slew of motions. Let me first
25 address what I have labeled the general motions. Of course,

1 it is understood that all defendants join in on all these
2 motions. I think that is basically the process we have
3 adopted. You have no need to be concerned about whether your
4 rights are being preserved as far as the record that we will
5 be making in this case.

6 I have a general boilerplate request for a bill of
7 particulars. Is there any need that I have here to really
8 address anything about that?

9 I don't think so.

10 I have the Brady request again. These are general
11 matters. I think we have spoken about them. I don't think
12 we have to do anything further today. I have a notation
13 about the 404(b) notice. We spoke about that.

14 I listed something about the request that the
15 government produce certain individuals in Court to commit
16 permit defense counsel to conduct interviews. Is there
17 anything I need to address in terms of that?

18 MR. SHARGEL: Mr. Levitt has that motion.

19 THE COURT: The standard is, of course, defense
20 counsel should have the opportunity to have access to
21 witnesses and to question them. Of course, there are limits
22 to what you can say to each other in respect to all of that.
23 Certainly, defense are entitled to have access to prospective
24 witnesses by the government.

25 What do you wish to say in that respect?

1 MR. LEVITT: If I could backtrack for a moment.
2 With respect to the Brady issue, we had addressed
3 specifically a Brady letter sent to the defense by the
4 government dated July 24th. In that letter, the government
5 suggested that under Brady there are certain witnesses to
6 whom we may wish to speak without providing us any additional
7 information besides the name.

8 Your Honor knows from the motions that we have
9 filed that we have endeavored to speak to the persons on that
10 list essentially without success.

11 The government has --

12 THE COURT: They don't have to speak to you. They
13 have to certainly --

14 MR. LEVITT: Certainly not. Since they haven't
15 spoken to us, we don't have access to their testimony. The
16 government is privileged to information that suggests these
17 people possess Brady evidence. We therefore ask the
18 government be required to turn over whatever documentary
19 evidence they have.

20 THE COURT: I don't know whether the government
21 knows about anything these people may have at their disposal.

22 MR. LEVITT: I don't mean what they possess but,
23 rather, the government possesses in the way of 302s or other
24 documents that reflect the type of information to which the
25 government is privileged which led them to write the Brady

1 letter in the first place.

2 THE COURT: Do you know what Mr. Levitt's concerns
3 are here, Mr. Genser?

4 MR. GENSER: The government's position is, we have
5 complied with the dictates of Brady by alerting the defense
6 to the identities of individuals who have potential Brady
7 material or who may have potential Brady material.

8 THE COURT: If you know that there is such
9 material, do you not have an obligation to disclose that?

10 MR. GENSER: First let me just state that we are
11 aware that there is some information which they may consider
12 to be potentially Brady material although we may not credit
13 the information.

14 THE COURT: Sometimes there is a gray area.

15 MR. GENSER: Exactly. That's why we have alerted
16 them to the identities of the individuals. They are free to
17 subpoena those individuals and call them as trial witnesses.
18 I don't think our obligation goes beyond that.

19 THE COURT: It seems to me -- I am just talking
20 conceptually here; you know more about these people than I
21 do obviously. It seems to me conceptually, if you know there
22 is a particular document that you are aware of, even if it
23 arguably is not physically in your possession, if that's what
24 we are talking about --

25 MR. LEVITT: What I am talking about, your Honor,

1 is the following. The government interviews certain persons
2 either through the government attorneys or the FBI. They
3 generate a report, a 302, in the instance of some, maybe
4 internal memo in the instance of another, which reflects the
5 statement of a person out there which is exculpatory as to
6 our clients.

7 It is our position that because we can't speak with
8 these persons, it is not practical for the government to say,
9 well, you can subpoena these people and have them testify
10 cold. In the real world it doesn't work that way. We have
11 endeavored to speak with these people who may be possessed of
12 Brady-type evidence. They have declined to talk to us. They
13 may have it in their file. The government may have.

14 THE COURT: I don't understand something here. If
15 the government has in its file any document at all that could
16 be exculpatory, the government has an obligation to turn that
17 over. What am I missing here?

18 MR. GENSER: Judge, I think that our obligation
19 under the law and the dictates of Brady is satisfied. If a
20 witness has information which may be viewed by the defense as
21 helpful to them, the cases are fairly clear that we satisfy
22 our obligation by --

23 THE COURT: I am not talking about that. I am
24 talking about if you have any documents or information that's
25 written down that could arguably be exculpatory. Don't you

1 have an obligation to turn that over?

2 MR. GENSER: I guess we're going in a little bit --

3 THE COURT: We have --

4 MR. GENSER: -- of circles with that --

5 THE COURT: Things to do today. If there is any
6 document you have at all that arguably could be viewed as
7 exculpatory material, I am not talking about Giglio, but
8 certainly if you have a problem, you send it to me in camera
9 and I will look at it and decide whether to turn it over.
10 We want to avoid post-verdict Brady motions.

11 MR. GENSER: May I make a suggestion. We will
12 prepare a letter that summarizes the substance of any
13 statement to us that might be viewed by the defense to have
14 been exculpatory and identify who made the statement.

15 THE COURT: Okay.

16 Let's do that.

17 MR. GENSER: Otherwise we will get into the whole
18 issue of redacting portions that don't qualify under Brady.

19 MR. SHARGEL: That's wholly unsatisfactory. I
20 object to that. I make a constitutional objection under
21 Brady v. Maryland or Giglio if they have information. They
22 can't be the people who decide what's helpful or what fairly
23 summarizes.

24 THE COURT: I will look at it. I don't want to
25 really engage in prolonged debate here. I don't quite

1 understand. If there is a cat and mouse situation or
2 whatnot, the way we cut through it all, you send to me
3 everything you have in writing that arguably in your opinion
4 could be deemed exculpatory. I will look at it. If you
5 can't comfortably turn it over because you are concerned
6 about the need to redact or whatever, you let me know. We
7 are making a record here that could come back to haunt you if
8 there is a conviction. I just alert you to that right now.
9 You are going to have make sure that doesn't happen if you
10 want whatever conviction that may be obtained to be upheld.

11 MR. GENSER: On that note, I believe that the
12 constitutional dictates of Brady does put the onus on the
13 government to actually sift through the material and select
14 and identify that which might be Brady. To suggest that we
15 should then open our -- I am not sure the Court truly wants
16 us to open all of our files for the Court to review every
17 document we have.

18 I think my suggestion would be let us prepare our
19 letter and see if that satisfies the defense. If they have
20 some other concerns or some follow-up requests for something
21 concerning a witness. We'll address it at that time.

22 MR. SHARGEL: Could I say one thing to round out
23 the record on this.

24 I understand it is the government's burden to go
25 through its file and select Brady. I am not asking for open

1 file discovery. That is not the point.

2 What I hear Mr. Genser saying: he is going to
3 write a letter and he is going to summarize the Brady
4 material. In other words, he has already identified a
5 document that qualifies as Brady material but instead of
6 turning over the document either to the defense or at least
7 to the Court, he is going to summarize what it is that is in
8 the document.

9 I am not satisfied with his summary. Either he
10 turns it over or if he has some question about it, he turns
11 it over to the Court.

12 THE COURT: Look, I don't know how large a list you
13 are talking about. Why don't you start in that direction.
14 At least we've identified material. Let's see how large a
15 list it is. You think about things as a result of this
16 little dialogue we are having in Court today. My sense is
17 that when I look at that list, we will see how large it is.

18 If there is -- may just call upon you to produce
19 it? Let me look at it if you have a problem. You consider
20 this, okay.

21 MR. GENSER: Yes, we'll consider that.

22 MR. LEVITT: When will that be done?

23 THE COURT: Obviously we want everything done
24 quickly. That's why we are meeting here today, to give us
25 time before January 6 to do all those things.

1 I know you folks have a lot of work to do. I
2 realize that. There is no reason -- you tell me how much
3 time do you think this will take?

4 MR. GENSER: To prepare a list of the materials.
5 We can do that quickly.

6 THE COURT: All right. Do that quickly. Think
7 about whether you will turn over any of this material to
8 counsel and indicate what material you feel that you do not
9 want to turn over to counsel. I will be looking at that.
10 You make the selection process. I mean it is the
11 government's responsibility, but I think that we will all
12 well-served if you are very well-focused on all of this.
13 Okay.

14 MR. LEVITT: Can that be done next week, your
15 Honor?

16 THE COURT: Well, as compared to the week after
17 that?

18 MR. LEVITT: Sure. Precisely. If in fact this
19 discloses things we have to follow up on, it is going to be
20 difficult as a practical matter.

21 THE COURT: I understand. I am advised the trial
22 is going to last more than a couple of days.

23 MR. GENSER: We'll do that. We will identify the
24 items and even summarize, go beyond what the Court has asked.

25 THE COURT: If you can do that by the end of next

1 week. I know we have Christmas day. I want people to enjoy
2 the holiday. I understand that. Make your best efforts to
3 get it done by the end of next week. If there's any follow-
4 up problems, get back here on January 6. We'll focus on that
5 during that week.

6 MR. GENSER: Yes, your Honor.

7 THE COURT: Anything else?

8 MR. GENSER: We had next asked your Honor with
9 regard to producing in Court informants who are under the
10 control of the government for the defense to quash --

11 THE COURT: You want an opportunity to speak to
12 them to see whether they will talk to you. How many people
13 are you talking about?

14 MR. LEVITT: The government would know. I
15 wouldn't.

16 MR. GENSER: Our response to that request was that
17 we don't have informants that won't -- if we do have
18 informants, they will be witnesses that will testify. So
19 under the rule of Rosario and Saa, there is no obligation to
20 identify them and grant them interviews pretrial. I am not
21 sure what the request is directed to.

22 THE COURT: I will give you an opportunity during
23 the course of the trial to speak to these people.

24 MR. LEVITT: Prior to the testimony, we'll have
25 that opportunity?

1 THE COURT: We'll see how it works. These people
2 could come into Court before they testify. We'll see whether
3 we'll give you a chance to talk to them. How does that
4 sound?

5 MR. GENSER: It is a fine, judge.

6 MR. LEVITT: If we could do that in a timely way.
7 If it doesn't happen until after their testimony, it is
8 obviously irrelevant to us.

9 THE COURT: I am not going to march them in here
10 right now. I don't know who these people are.

11 MR. LEVITT: I don't either because they haven't
12 told us.

13 THE COURT: It is a little premature to do that
14 now. We'll monitor that.

15 What else?

16 MR. SHARGEL: I have nothing else for today, judge.

17 THE COURT: Let's turn to the focussed motions.
18 Let's take Peter Gotti's first.

19 I have the motion to suppress the FBI wiretap and
20 FCI McKean. I reduced that to a written format.

21 MR. SHARGEL: We have received that.

22 THE COURT: The rest of these, I am going to
23 dispose all of this in Court today. Why did I put that in
24 writing? I thought it was valuable to husband this
25 information and cobble it into something in written form.

1 Are there any Peter Gotti motions out there that I
2 may not be aware of?

3 MR. SHARGEL: We made the motion with respect to
4 timely production of the Brady based on --

5 THE COURT: We discussed that just now.

6 MR. SHARGEL: Right. Beyond that, there is nothing
7 else.

8 THE COURT: All right.

9 Mr. Shargel, unless there is something else you
10 wish to bring to my attention, why don't I ask Mr. Cassarino
11 to step forward while I address his motions.

12 Mr. Levitt.

13 Apparently Mr. Cassarino is behaving himself on his
14 release, which I am happy to see. I heard nothing to the
15 contrary from anybody else. How is his daughter doing?

16 MR. LEVITT: Doing well. There have been some
17 issues concerning the next stage of the surgery. They had to
18 wait a while. Obviously it is going to be happening
19 fortunately, and we are very optimistic. Thank you.

20 THE COURT: Once again, the written decision I
21 rendered embraces Mr. Cassarino's suppression motion as well.
22 You have that ?

23 MR. LEVITT: We do.

24 THE COURT: I want to discuss a little bit your
25 application to dismiss racketeering acts 23 to 30 and 49 to

1 65 for lack of specificity or in the alternative to require
2 the government to identify John Does 12 through 8.

3 I believe that the indictment is properly pled. I
4 have no problem with the specificity. Let's focus on the
5 John Does. When do you think counsel should know the
6 identity of these people? As I read your papers, you sort
7 have taken the position you really have in effect identified
8 these people, that you have given so much information from
9 the government that they should be able to figure out or to
10 discern who these people are. My concern is if that's the
11 case, you know it is not that you are not disclosing these
12 people, you are just making it little more difficult and
13 requiring defense counsel to spend perhaps an excessive
14 amount of time to get to ultimately where they should be
15 entitled to get. Why can't you just tell them who they are
16 instead of require them to have to sift through all the
17 papers?

18 MR. GENSER: Judge, perhaps after this status
19 conference I can speak with defense counsel and identify the
20 individuals.

21 THE COURT: I direct you to do that based upon that.
22 I was going to direct Mr. Genser to do that because you have
23 disclosed these people in effect.

24 MR. GENSER: I think they already know who they
25 are.

1 THE COURT: Be specific about it so there could be
2 no possible mistake.

3 MR. LEVITT: If I can add to the record in fact
4 another member of the government team has disclosed that to
5 us.

6 THE COURT: You are fine with that?

7 MR. LEVITT: I am fine with that. The only thing
8 that hasn't been disclosed is the identity of the person who
9 supposedly or whose potential testimony supposedly was
10 obstructed in the obstruction of justice charge. I assume
11 the government is willing to give me that.

12 MR. GENSER: I think we revealed that previously,
13 Richard Bondi's stepson Anthony Frizetta.

14 THE COURT: This is the way we should go about our
15 business. We're having this colloquy in Court and we are
16 able to satisfy people's concerns rather than to have
17 excessive paperwork.

18 Anything else?

19 MR. LEVITT: No, your Honor.

20 THE COURT: Let me speak to Mr. Ciccone's lawyer
21 now with respect to his motions.

22 MR. MITCHELL: John Mitch. I am going to appear on
23 this.

24 THE COURT: I have a host of things you have raised
25 on behalf of Mr. Ciccone. Let me see whether I have them all

1 itemized correctly. You let me know if I missed anything.
2 All right.

3 I move to dismiss Count One, the racketeering
4 conspiracy count, because you claim it is based upon improper
5 theory of vicarious liability and/or is duplicative.

6 I don't believe that that is correct. There are
7 two branches to that apparently.

8 MR. MITCHELL: Your Honor, if I may quickly, to
9 summarize it. The problem I have with these sort of
10 monolithic 1962 (c) counts, the law is clear each defendant
11 commits his own 1962 (c) violation. He is not vicariously
12 liable for the racketeering acts that are committed by
13 others.

14 THE COURT: Nobody is suggesting that he is.

15 MR. MITCHELL: The indictment, most respectfully,
16 does. If you look at the count, it talks about single
17 pattern of racketeering act. There is not a "single," there
18 is nine, because each individual defendant has to commit his
19 own pattern.

20 THE COURT: I don't agree with that. Look, the
21 indictment is pled exactly the way all these racketeering
22 indictments are laid out. We know the jury is going to have
23 to assess the criminal culpability of each defendant. We
24 know that in Count One they all join together in terms of
25 being charged with a conspiracy to engage in racketeering

1 activity and that it is part of an enterprise, and they are
2 going to, of course, be kept to discrete racketeering acts
3 that apply to them. We have predicate acts. It is in the
4 indictment. It is all alleged in the indictment.

5 MR. MITCHELL: Most respectfully, Second Circuit
6 has said it: You can't treat a 1962 (c) count as RICO
7 conspiracy.

8 That's precisely what they are doing.

9 THE COURT: No, no, no. What you are suggesting is
10 you carve out and separate a RICO conspiracy count in respect
11 to each individual defendant.

12 MR. MITCHELL: No, sir. What I am saying you have
13 the substantive RICO, the 1962 (c). Then you have RICO
14 conspiracy 1962 (d). The problem is each individual person
15 must commit a discrete 1962 (c) violation.

16 THE COURT: That's right.

17 MR. MITCHELL: Must have his own pattern of
18 racketeering activity. What you had in Count One is nine
19 separate discrete 1962 (c) counts, nine different crimes
20 charged in a single count. There is no explanation offered
21 as to how that couldn't be duplicitous other than the
22 argument argued in the brief: This is the way we always do
23 it.

24 The fact is they don't offer a single explanation.
25 They point to 108(b) to say somehow it justifies. It

1 doesn't. They point to the decision in United States v.
2 Hickey where the question wasn't even raised. For the life
3 of me, most respectfully, how can you have nine separate
4 crimes charged in a single count?

5 THE COURT: I don't think there is nine separate
6 crimes. There is an overarching criminal conspiracy here.

7 MR. MITCHELL: That's the second count, RICO
8 conspiracy count. The first count is a substantive count.

9 THE COURT: Mr. Genser, what do you say about that?

10 MR. GENSER: Judge, I think we're all familiar with
11 indictments and counts in indictments that charge, let's say,
12 ten or twelve or even twenty individuals with participating
13 in the same crime. Each of those individuals, even though
14 they are named in the same count, is charged in a separate
15 crime. So there is no duplicity, as my colleague suggests.

16 I think your Honor is absolutely correct, there is
17 no flaw in the way this indictment is pled. The indictment
18 specifically states that each defendant committed two of the
19 acts and so it is clear we are talking about a separate
20 pattern for each defendant. It is simply a matter of
21 drafting --

22 THE COURT: The jury is going to be properly
23 charged, and certainly you have sufficient knowledge as to
24 what the alleged crime is that your client is being charged
25 with. I have no problem with that. What you are proposing

1 would just produce multiple additional pieces of paper
2 without any real substantive value to that.

3 MR. MITCHELL: Here is the problem. The problem
4 is, when you read the indictment as a layperson, indeed, if
5 you read it as an experienced person --

6 THE COURT: I am not sure the jury is going to be
7 reading the --

8 MR. MITCHELL: The allegation will be given. It
9 suggests a single monolithic 1962 (c) substantive count. It
10 suggests all the defendants are guilty of the pattern of
11 racketeering activity that's pled.

12 THE COURT: Let me suggest this.

13 The motion is denied. The jury is going to be
14 properly charged. It is more of a charging issue than,
15 really, a pleading issue. The jury may not even see this
16 indictment. I am not necessarily going to give it to them.
17 I am not exactly sure how I am going to husband all this
18 information, but I am going to do it in a way so the jury can
19 hopefully understand what this is all about.

20 I may not track the indictment. I generally don't
21 give the jury the indictment. We deal with that when it
22 comes to charging the jury. All right.

23 THE COURT: Let's go on to address -- count two I
24 think falls in the same broad category. I am satisfied.

25 MR. MITCHELL: The problem with Count Two, your

1 Honor, 1962 (d) makes it a crime to conspire to commit a 1962
2 (c) violation. The problem is the second count says that the
3 defendants are guilty of RICO conspiracy because they
4 conspired to commit the 1962 (c) violation set forth in Count
5 One. The problem with that is there isn't one of them.
6 There is nine of them.

7 THE COURT: What's wrong with that?

8 MR. MITCHELL: That's nine conspiracies in one
9 count, your Honor.

10 THE COURT: Once again I think it is going to be a
11 charging issue really, not an indictment issue.

12 All right. I looked over the indictment. I think
13 it is properly pled. I think it is necessary to join a
14 multiple number of defendants in respect to these crimes in
15 counts one and two. Otherwise, we have a 200-page indictment
16 which would make it more difficult for the Court to absorb
17 than already is the case.

18 You have your record. Your motions are denied in
19 respect to those two issues. I am more troubled by the third
20 branch of your motion to dismiss Racketeering Act 23 because
21 the subpredicate act 23 (c) does not qualify as a
22 racketeering act. Also to dismiss racketeering acts 31 and
23 32 and count 66 and 67 for failure to allege all of the
24 necessary elements of the offense under state law.

25 I am less troubled with racketeering some predicate

1 23 (c). I am a little more troubled with 31 and 32 and count
2 66 and 67. I think 23 (c) is properly pled.

3 It is the extortion conspiracy and attempt in
4 connection with the efforts to deprive John Doe one, who we
5 know who that is, an employee of Holland Hook Container
6 Terminal. Count 23 (c) brings with it the same conduct under
7 the state law theory of --I should say 23 (c) cites
8 specifically to New York Penal Law Section 110 which is a
9 1155.50, which is larceny by extortion and 155.40, which is
10 grand larceny in the second degree. The only thing missing,
11 it doesn't set forth the specific elements of those sections.
12 Is it your position that the indictment is fall at this --

13 MR. MITCHELL: Yes, sir.

14 THE COURT: -- because you are claiming that the
15 state statutes are not set forth in terms of their particular
16 elements.

17 MR. MITCHELL: Yes, sir. I think now that's
18 functionally the law of the Second Circuit after United
19 States v. Cirrillo. It is also the thrust of the decision in
20 United States v. Miller.

21 THE COURT: Wait a second. Go slow.

22 Look, the law is clear in the Second Circuit under
23 Arena and under Cirrillo that you don't have to --

24 MR. MITCHELL: Those cases are not the law anymore
25 in the circuit.

1 United States of Cirrillo -- C-i-r-r--

2 THE COURT: That's why I mentioned you read
3 Cirrillo. Cirrillo says Arena is no longer good law.

4 THE COURT: Cirrillo makes it perfectly clear that
5 for purposes of RICO predicate acts you only need to have the
6 generic definition of the underlying state crime. Cirrillo
7 does not say, as you contend, that you have to allege the
8 specific elements of the state crime.

9 I read it carefully. I don't agree with your
10 assessment. Your motion is denied with respect to 23 (c).

11 MR. MITCHELL: May I say one other thing? The
12 reason why the state elements are necessary in the
13 overarching federal crime is because even if you refer to a
14 statute such as Penal Law Section 212, whatever it is, you
15 don't have any guarantee that's what the grand jury
16 considered. The grand jury obviously --

17 THE COURT: You are mixing, with all due respect,
18 apples and bananas.

19 We are going to talk about counts 66 and 67 in a
20 short period of time. We are right now talking about a
21 RICO --

22 MR. MITCHELL: Here is the reasoning. The fact
23 is, 23 (c) would be a misdemeanor under state law if it was
24 an attempt to commit a generic extortion. The government
25 says it is not a misdemeanor but a felony because there is a

1 specific extortion statute which is one step above the lowest
2 felony and state law and therefore an attempt to commit it is
3 a felony as well.

4 The fact is the only way that you know what the
5 statute -- state statute they say he violated is a reference
6 to the --

7 THE COURT: Let's talk about the substantive count.
8 Let me read to you from Cirrillo just so we have effective
9 dialogue.

10 The Court references Arena which wasn't overruled
11 by saying that, there we stated that only a generic definition
12 of an underlying state crime is required in a RICO indictment
13 as distinguished from the elements of the penal codes of the
14 various states where acts of racketeering occur.

15 The Court in Cirrillo goes on to make it perfectly
16 clear that while a generic definition is sufficient for
17 purposes of pleading a RICO predicate count, indeed the
18 government will have to establish and prove at the trial the
19 requisite element under the state law.

20 That's the law of the Second Circuit. I don't
21 agree with your assessment.

22 MR. MITCHELL: Most respectfully, your Honor, I
23 don't think that Cirrillo ever focused on the grand jury
24 question. It simply can't be. If it is an element of the
25 offense, it can't be it doesn't need to be charged.

1 THE COURT: I made a record. I disagree with you.
2 Sometimes I am wrong but --

3 MR. MITCHELL: It goes back to Russell and all
4 those cases.

5 THE COURT: It is an important thing to make the
6 record, and I will make my ruling.

7 I am more interested here where I am going to put
8 pressure on the government attorneys to talk about the RICO
9 predicate acts 31 and 32 as well as the substantive count 66
10 and 67.

11 Mr. Genser, in going through the indictment, I am
12 puzzled about a few things. Bearing in mind what I just
13 announced as the law for proper pleadings of RICO predicates
14 and subpredicates, turn, if you would, to 31 and 32.

15 That is going to be at page 35 of the indictment.
16 Do you follow with me?

17 You are alleging there is a predicate illegal
18 gambling business. You talk about Joker Poker. I assume
19 that means these are gambling machines you are referring to,
20 Joker Poker. Am I correct?

21 MR. GENSER: Yes.

22 THE COURT: You allege violation under 1955 (2)
23 which is the federal crime of course. You make no reference
24 here to the sum of \$2,000 in a single day that is one of the
25 elements under 1955. When you then plead Racketeering Act

1 32, which you also allege is a violation of 1955, you do make
2 reference there to the sum of \$2,000 which satisfies 1955.
3 You don't refer to the specific state penal codes as you do
4 when you talk about the substantive counts in 66 and 67. You
5 had some reason, I guess, in that respect. I am not so sure
6 why you could not have made reference to the statutes even
7 though under Cirrillo and Arena there is a looser standard,
8 so to speak, for pleading RICO predicates than substantive
9 counts, perhaps.

10 Why is it that you left out the \$2,000 for
11 racketeering act 31? You will see the progression in my
12 questioning after you answer that question.

13 MR. GENSER: I think I understand your Honor's
14 concern. It is my understanding that the way Section 1955
15 works is there are alternative types of conduct that can
16 violate the statute, and there is sort of an either or in
17 terms of whether a business meets -- an illegal gambling
18 business meets those elements. I think it is either \$2,000
19 in a single day or substantially continuous operation for a
20 period in excess of 30 days.

21 THE COURT: I am trying to find what statutes you
22 are referring to.

23 MR. GENSER: 1955.

24 THE COURT: What state law are you talking about?

25 MS. JESTIN: First addressing the federal law in

1 the first question you asked.

2 THE COURT: The 1955 requires \$2,000 in any single
3 day.

4 MR. GENSER: What I am saying to your Honor, I
5 believe 1955 doesn't require that. That is one way that the
6 statute can be violated. It is that or --

7 THE COURT: What other part of 1955 would be
8 implicated in this particular charge?

9 MR. GENSER: I don't have it right in front me.

10 THE COURT: You talk about five or more people. I
11 am trying to follow the bouncing ball. I would like to know
12 what you are referring to in terms of the state penal law.
13 You may not have to set it for the --

14 MR. GENSER: I am addressing section 1955
15 subsection B.

16 THE COURT: B.

17 MR. GENSER: Subsection B, subindex 3B1.3 (b)
18 defines an illegal gambling business means a gambling
19 business which, one, is a violation of the law of the state
20 or subdivision in which it is conducted. Two involves five
21 or more persons who conduct, finance, manage, supervise,
22 direct or own all or part of such business. Three, has been
23 or remains in substantially continuous operation for a period
24 in excess of 30 days or has a gross revenue of \$2,000 in any
25 single day.

1 That is why -- that is not a requirement in every
2 case. If you can show that the business --

3 THE COURT: In other words, if it has a 30-day
4 continuity or the \$2,000.

5 MR. GENSER: Yes. It is definitely difficult to
6 parse out. I think it is clear once you focus on that
7 particular provision that that aspect of it is --

8 THE COURT: I can tell you. I read that and of
9 course I read RICO Act 232. I am not and lay juror. I had a
10 difficult time parsing out. You even had a difficult time
11 parsing it out. I think in fairness to the defense, while we
12 have this rather loose pleading requirement for predicate
13 acts that they are entitled to have a little bit more
14 knowledge of what you are talking about. They have a little
15 more knowledge now than they had before.

16 MR. GENSER: We did try to identify the type of the
17 gambling business in the indictment. It is not just
18 boilerplate. We meant Joker Poker machines and things of
19 that nature.

20 THE COURT: Let's turn to your substantive counts.
21 Here, 66, which is Joker Poker, that is the name of the
22 machine?

23 MS. JESTIN: Type of machine, yes, that is
24 correct.

25 THE COURT: You don't reference the \$2,000 there.

1 You do reference specifically Penal Law Section 225.10. It is
2 the position of counsel you should do more than that, that
3 you should set forth the elements of the state law. I don't
4 think that necessarily is required, but I will hear from Mr.
5 Mitchell about that so you can make a record.

6 MR. MITCHELL: Your Honor --

7 THE COURT: Let me finish first.

8 Count 67, you do specifically talk about the
9 \$2,000. When I look at 225.10, it doesn't say what you just
10 told me your RICO predicate is all about. It does
11 specifically talk about promoting gambling in the first
12 degree. That's the specific reference you are making in
13 count 66. Then the elements of that are twofold. The first
14 one is engaging in bookmaking to the extent that he receives
15 or accepts in any one day more than five bets totalling more
16 than \$5,000. I don't see that at all in count 66. You are
17 not really referencing that specific type of bookmaking
18 activity which is the basis of 225.10.

19 May have had in mind, maybe, 225.30, which doesn't
20 reference a \$5,000 threshold requirement. It talks about
21 possession of a gambling device. I find considerable amount
22 of confusion in terms of what it is you are specifically
23 charging in that substantive count which I think requires at
24 least reference to the state statute.

25 What's going on here?

1 MR. GENSER: Judge, I think the indictment in count
2 66, the Joker Poker indictment identifies New York Penal Law
3 Section 225.10 as the state statute which is alleged to be
4 violated. I am somewhat handicapped right now because I
5 don't have a copy of that in front of me.

6 THE COURT: 225.10?

7 MR. GENSER: Yes.

8 THE COURT: Take my copy. You are talking about in
9 count 66 gambling machines whereas 225.10 doesn't necessarily
10 reference gambling machines. 25.30 does. Under 225.10, you
11 have to have \$5,000. The federal statute requires \$2,000.
12 Since we are talking about New York State, you have to deal
13 with \$5,000 it seems to me. There may be other slants which
14 has a \$2,000 requirement or \$500. Who knows?

15 The issue that really I am troubled with has the
16 grand jury been presented with sufficient information to be
17 able to render an indictment in respect to substantive count
18 66 and 67 based upon \$5,000.

19 MR. GENSER: Do you want to say something.

20 MR. MITCHELL: I am not anxious to say anything.

21 MR. GENSER: Section 225.10 offers two ways in
22 which the statute can be violated. It also includes language
23 that is defined elsewhere in the statute. I don't have it in
24 front of me. There are definitions of what bookmaking
25 actively is and what policy and lottery schemes and

1 enterprises are.

2 THE COURT: I have to read it. It seems to me you
3 have to show \$5,000 of activity. You are telling me you
4 don't.

5 MR. GENSER: That is under the first prong. The
6 second prong is receiving in connection with policy or
7 lottery scheme or enterprise, money or written records from a
8 person other than a player who --

9 THE COURT: You are talking about gambling machines
10 here. You are not really saying anything here that tracks
11 that subdivision.

12 MR. GENSER: Judge, what I am saying is the
13 definition of lottery or policy scheme as defined in the
14 statute is broad enough to include a Joker Poker machine. A
15 Joker Poker machine, lottery --

16 THE COURT: What is the purpose of 225.30 which
17 talks about gambling devices which is exactly what you say in
18 count 66?

19 MR. GENSER: Judge, I mean perhaps that could also
20 have been charged as the underlying state violation but we
21 have identified this statute.

22 THE COURT: I have some problems with whether you
23 have legally properly pled 225.10 in count 66. I may require
24 some further submissions from counsel.

25 Let's turn to --

1 MR. MITCHELL: Could I make one point on that?

2 THE COURT: Yes.

3 MR. MITCHELL: This is precisely what happened in
4 United States v. Miller, which is an Eighth Circuit decision,
5 the only Court of Appeals to ever decide this question. In
6 Miller there was allegation that a particular state statute
7 was violated but they didn't set forth the elements.

8 Here is what the Court in Miller said.

9 In Miller, the problem is that they do not even set
10 forth the section of the state law.

11 In the decision it says an allegation that some
12 state statute has been violated does not fully, directly,
13 expressly without any uncertainty or ambiguity set forth all
14 of the elements necessary to constitute the offense intended
15 to be punished. The Court goes on to say -- I think this is
16 particularly appropriate under the circumstances of what
17 we're talking about now.

18 It says the indictment contained no assurance that
19 the grand jury deliberated on the elements of any particular
20 state offense. The indictment at bar contained no hint of
21 the acts for which Miller was being indicted.

22 Your Honor just now, it was sort of convenient that
23 the government couldn't even explain to you without
24 referencing the statute precisely what the state law
25 required. The grand jury would never have known that.

1 THE COURT: That's why we are talking about this.
2 Let me tell you about Miller here. I don't read Miller the
3 way you do. The difference factually in Miller and in 66 and
4 67 is that in Miller was no reference whatsoever to anything
5 other than 1955 (b), the federal law. There is no reference
6 to the state statute.

7 MR. MITCHELL: That's true in 33 and 31.

8 THE COURT: Here.

9 Those are RICO acts which take on different aspects
10 in terms of liberal requirements for pleading purposes. Now
11 we are talking about substantive crimes. RICO acts are
12 really governed -- I spoke about that. When we talk about
13 the substantive crimes, I want to point out to you that's
14 what is different in this case. The government does
15 reference specific title, chapter, verse of the state crimes.

16 In Miller the Eighth Circuit distinguished a case
17 from the Fifth Circuit called United States v. Marifield --
18 M-a-r-i-f-i-e-l-d -- saying the government's reliance on
19 Marifield was misplaced by -- unlike the instant case, the
20 indictment there described the conduct in question as the
21 operation of a business for placing bets on dice and cards.
22 The indictment also stated the title and section of the state
23 law alleged to have been violated. I read Miller as drawing
24 a distinction between an indictment which doesn't make any
25 reference to the state statute by chapter, book and verse, so

1 to speak, as compared to a pleading such as we have here
2 where there is specific reference to the actual penal law.

3 MR. MITCHELL: Your Honor, if I may. To what end
4 does it serve? I mean, when you think about it from a
5 practical level. The grand jury has no clue what that --

6 THE COURT: You are arguing about something which
7 you suggest is a common sense type of thing which I tend to
8 agree with you. I am talking about the law.

9 MR. MITCHELL: Constitutionally, your Honor, if it
10 is an element of the offense, it has to be passed on by the
11 grand jury.

12 THE COURT: I don't agree. I think for pleading
13 purposes, to refer to the nature of the crime, specific
14 information you spoke about, that little bit here and the
15 reference to the particular state law of the statute by penal
16 law doesn't have to have the elements set forth. That's why
17 my reading even of Miller especially as pointed out the way
18 it distinguishes the Fifth Circuit case in Marifield (sic).
19 Think about that.

20 Let me now turn back to the government.

21 In 67, you do refer specifically to 225.10 and to
22 the \$2,000. All right. Under 225.10 unlike 1955 you need
23 \$5,000. How do I know whether the grand jury was presented
24 with sufficient evidence to justify a \$5,000 scenario if for
25 argument's sake all that was before the grand jury was

1 \$2,000. Then wouldn't I have to dismiss count 67 at the very
2 least?

3 MR. GENSER: The answer to that is your Honor does
4 not have to dismiss the count because your Honor can rely
5 upon the fact that the jury was instructed, the grand jury
6 was instructed on all of the elements of all of the offenses.
7 We specifically listed the state statute they were
8 instructed --

9 THE COURT: Did you tell the jury they had to be
10 satisfied that there is \$5,000?

11 MR. GENSER: Yes, judge.

12 THE COURT: What you'll do is send to me in camera
13 that part of the grand jury minutes where you gave the jury
14 that instruction and also, you know, support it with that
15 part of the grand jury minutes which shows that we're not
16 just dealing with \$2,000 but we are dealing with \$5,000.

17 MR. MITCHELL: Since it is not evidentiary, could
18 we see that?

19 THE COURT: No. Let me take a look at it. I think
20 that's the right way to proceed. I think you can trust my
21 judgment on these things.

22 MR. MITCHELL: Very well, your Honor.

23 THE COURT: If I find that the jury wasn't
24 charged-- if they were charged only on \$2,000 and there is
25 nothing to support \$5,000, I will dismiss that count. Let me

1 take a look.

2 MR. GENSER: I believe that the minutes will
3 satisfy your Honor's concern.

4 I would like to also point out that the section
5 referenced 225.10 has those two different definitions of
6 gambling activities. Those are terms of art defined in a
7 statute. I believe that the lottery and policy scheme prong
8 also would cover --

9 THE COURT: Maybe you have to give fair notice if
10 you are not going to set forth the particular elements which
11 as I read the law apparently you don't have to. I think at
12 least you have to make clear which aspect of a particular
13 statute you rely upon by making appropriate substantive
14 reference in the language you use in the count.

15 In respect to both 66 and 67, I want you to submit
16 to me for my in camera review what you have before the grand
17 jury that you believe would support your claims. I will be
18 particularly interested to see how you charge the grand jury
19 on count 66.

20 You understand what I need. We'll take a very
21 close look at that. You are clear about my rulings at least?

22 MR. MITCHELL: Yes.

23 THE COURT: You have a record.

24 All right.

25 Would you be kind enough to do that by maybe next

1 Tuesday so I can also take that to Puerto Rico with me? I
2 would like to come to peace with what is going to survive in
3 the indictment well in advance of the start of the trial.

4 MR. GENSER: Very well.

5 THE COURT: Let's see what else is left here.

6 I am going to deny all of the other motions. It is
7 Mr. Mitchell?

8 MR. MITCHELL: Yes, your Honor.

9 THE COURT: I have listed here that you take
10 objection to what you claim is the consolidation of several
11 counts because they are subsets of one larger offense. That
12 is an outgrowth of some of the things we discussed before. I
13 deny that.

14 MR. MITCHELL: It is actually the other way around
15 though.

16 THE COURT: Yes. Then you have this issue of
17 whether or not you can charge a crime composed of the
18 deprivation of so-called democratic rights. You can. My
19 understanding of where the circuit is at in that respect is
20 reflected in United States v. Bolomo, 176 F.3rd 580,
21 specifically at 592 to 593.

22 MR. MITCHELL: I don't disagree with that. The
23 reason principally this is raised, the Supreme Court is going
24 to hear --

25 THE COURT: You want to preserve your rights.

1 MR. MITCHELL: Right.

2 The Supreme Court is going to reach in NOW vs.
3 Schindler --

4 THE COURT: Do you need what I said? I said I
5 refer to United States v. Bolomo, which is 76 F.3rd 508 at
6 pages 592 to 593. Then Mr. Mitchell said he was just
7 preserving the record, agrees that is the position of the
8 Second Circuit and that apparently certiorari has been
9 granted.

10 MR. MITCHELL: In the case of NOW v. Schindler, it
11 was a civil RICO case in which the National Organization of
12 Women went after antiabortionists and the predicates that
13 they used were Hobbs Act, saying it was deprivation of
14 property to deprive woman of abortifacient services.

15 The Court is going to hear the issue on whether or
16 not that's a sufficient property right to justify Hobbs Act.

17 THE COURT: It is wise of course of counsel to
18 preserve your rights. I don't see where this case dealing
19 with deprivation of union benefits is quite the same thing as
20 the NOW case. We'll see how it washes out. The issues is
21 preserved.

22 I read another case by the Second Circuit as
23 reinforcing the position that the indictment properly alleges
24 deprivation of property rights, United States v. Arena at 180
25 F.3d, 380, at page 392. That also is a 99 Second Circuit

1 decision. That talks about the Hobbs Act being not limited
2 to tangible things but includes intangible assets, such as
3 the right to solicit customers and conduct unlawful business.

4 You have a proper record.

5 MR. MITCHELL: Thank you, sir.

6 THE COURT: All right.

7 The last thing you raise is how the forfeiture
8 count, which is what count 72 or something like, that is to
9 be processed. My understanding, first you have to get a
10 conviction and then there could be a subsequent proceeding
11 focusing on the forfeiture issue if the government wishes to
12 proceed on that basis and separate evidence would have to be
13 forthcoming.

14 I don't think we have to deal with that now.

15 MR. MITCHELL: The only question is, does the jury
16 decide--

17 THE COURT: My understanding, the jury decides in a
18 separate proceeding.

19 MR. MITCHELL: Yes, sir.

20 THE COURT: Do you agree with that?

21 MR. GENSER: I think I do, judge, but I think your
22 Honor is right. We can cross that bridge when we get to it.

23 THE COURT: We have enough on our plate right now.
24 I have handled all of your motions.

25 Mr. Mitchell, is there anything I may have

1 inadvertently left out?

2 Mitch no, sir. I believe that's it.

3 THE COURT: Thank you.

4 The last thing I have on my list that is pending is
5 the Bondi motion. Unless there is something else to talk
6 about, we can let everybody else go home and keep you
7 captured here since we have different issues that flow from
8 the hearing we had. We could take a little break right now.

9 Is there anything else we need to do with everybody
10 else?

11 MR. SHARGEL: No.

12 THE COURT: I will see you Tuesday morning 10:00.

13 Thank you all for your cooperation. Let's take a
14 ten-minute break.

15 Mr. Bondi's attorney will stay behind.

16 (Recess).

17 THE COURT: Let's now focus on the issue of the bond
18 that flows from the hearing that the Court conducted on
19 October 24th, 2002. Mr. Medina is here. The government
20 counsel is still standing tall here.

21 Mr. Medina, my heart is sympathetically disposed to
22 your plight. I guess if the \$30,000 was released, arguably,
23 as a practical matter, there may be some fees due to you and
24 that would be a source of funds. I can't do it for you. I
25 labored hard over thinking about whether he could do it for

1 you. In good conscience to my oath of office, I can't. I
2 will tell you why.

3 First of all, let me just make sure that we're not
4 dealing with any issue as to whether the underlying warrant
5 was valid and was properly executed. I thought we cleared
6 the decks on that during our colloquy when I said we don't
7 have to deal with the issue. You agreed. Yet, in your
8 papers you still revisited that issue.

9 There is no problem here with the search warrant or
10 the search.

11 MR. MEDINA: No, your Honor.

12 THE COURT: Do you want to have the opportunity to
13 somehow say something different to me now than what you said
14 to me back in October?

15 MR. MEDINA: Judge, I think the essential issue
16 here was whether or not the government had met their burden
17 of proof with respect to whether or not these particular
18 proceeds were the proceeds of crime.

19 THE COURT: I am going to deal with that. I am
20 talking about, for the nicety of the record, so to speak, the
21 issue of whether you are questioning whether the search
22 warrant was valid or whether it was validly executed. You
23 have not yet answered that. Your papers seem to fly back and
24 forth a little bit even to this date on that issue.

25 I try to lay that to rest when we were last here on

1 October 24th. I have this colloquy. I asked you whether,
2 Mr. Medina, you had ever really raised this issue before.
3 You really seriously want the opportunity to question whether
4 there was a legitimate basis to obtain the search warrant
5 because I think you may have said that. It doesn't seem as
6 if you are really serious about that. You said no, your
7 Honor.

8 So we don't have to deal with that. We are going
9 to hold that and not deal with anything dealing with the
10 search warrant.

11 MR. MEDINA: The probable cause issue --

12 THE COURT: Okay. We are squared away on that.

13 Let me just set forth the facts which I believe in
14 the hearing I think arguably are relevant to the decision
15 which I am constrained to render against your client.

16 One, October 28th, 2001, Richard Bondi received a
17 settlement in the amount of \$60,790.40. Those are legitimate
18 funds. Nobody is questioning that. The next day, October
19 29, he opened a bank account at the Granateville Shop-Rite
20 Branch of Staten Island Bank and Trust. Mr. Bondi had other
21 accounts at the bank, as a repeat customer was eligible to
22 make withdrawals from the new account without waiting for a
23 30-day grace period to pass.

24 According to the witness, Lisa Miguel, the
25 assistant manager at the bank, the bank would even be willing

1 to cash the check without waiting for the check to clear if
2 requested by the customer.

3 Three, on November 1, 2001, Mr. Bondi withdrew
4 \$2,000 from this account. On November 2, November 3,
5 November 5, November 6, November 7, November 8, November 9
6 and November 13, he withdrew \$6,000 on each of those days,
7 leaving a total of \$790.40. So \$60,000 was taken from the
8 bank.

9 Four, Mr. Bondi could have withdrawn the entire
10 amount at one time from the larger branch located a half mile
11 away. Additionally, according to Ms. Miguel, the bank would
12 have been willing to cover a withdrawal of the entire amount
13 from the Graniteville branch within a few days' notice to
14 receive a delivery of the cash if Mr. Bondi had asked.

15 Five, approximately three months later, on January
16 22, 2002, a Court ordered search warrant based upon probable
17 cause was issued by the Honorable Allan J. Meyer, judge of
18 the Criminal Court of the City of New York to search the
19 Bondi residence for, amongst other things, gambling records
20 and United States currency and other proceeds of illegal
21 bookmaking.

22 Six, the police found \$30,000 of which \$28,700 was
23 in \$100 bills. All this money was bundled and stored in a
24 garment bag in a closet in the master bedroom.

25 Seven, Richard Bondi at the time the \$30,000 in

1 question was removed from his home claimed the money was a
2 result of an accident settlement.

3 Eight, three weeks later, on February 11, 2002,
4 Special Investigator Joe Poccia overheard a conversation in
5 which Richard Bondi and other defendants appeared to be
6 speaking about money. Their conversation, although somewhat
7 garbled, is construed by the Court as referring to the money
8 as contraband/gambling proceeds or might be construed.

9 I will not make that specific factual finding. I
10 will just note that it arguably could be construed as
11 referring to the money as contraband gambling proceeds but it
12 is not necessary for me to specifically so find in terms of
13 the decision which I am rendering more specifically.

14 During the exchange of conversation Sunny Ciccone
15 stated: Let's see if we are going to tie this money into the
16 machines," and Bondi stated, "I got the best explanation to
17 prove where that money came from."

18 Nine, Special Agent Poccia said that the machines
19 that Richard Bondi collected money from did not take \$100.
20 However, he also testified that in his experience money was
21 often packed in large bills and bundled in even number of
22 dollars.

23 Last, No. Ten, Richard Bondi produced no receipts
24 showing where the settlement money has been spent nor did he
25 testify or offer any evidence other than calling Ms. Miller--

1 Medina I think you called her as well.

2 MR. MEDINA: That is correct.

3 THE COURT: Those are salient facts. Let me now
4 articulate my conclusions.

5 If a motion for return of property is made while a
6 criminal prosecution is pending, the burden is on the movant
7 to show that he or she is entitled to the property.
8 Generally a rule 41 (e) motion is properly denied if the
9 defendant is not entitled to lawful possession of the seized
10 property, the property is contraband, or subject to
11 forfeiture or the government's need for the property as
12 evidence continues.

13 Here, in the Court's judgment, Bondi has not
14 sustained his burden of proof which is by the preponderance
15 of the evidence that the property is not contraband. The
16 money is clearly not contraband per se, however it appears to
17 be derivative contraband.

18 There are two types of contraband; namely,
19 contraband per se and derivative contraband. Included in the
20 term contraband per se are things which intrinsically are
21 illegal to possess such as illegal narcotics, unregistered
22 stills, counterfeit money, sawed off shotguns and illicit
23 gambling devices. Included in the term derivative contraband
24 are things that are not ordinarily illegal, like guns,
25 automobiles, ships and currency that become forfeitable

1 because of their relationship with a criminal act.

2 Bearing in mind that the defendant has the burden
3 of proof, the fact that the money was in a large sum, it was
4 kept tied up in a rubber band and stored in a garment bag in
5 the bedroom closet suggests Bondi had knowledge that this
6 money was incriminating, and the fact that there was no
7 explanation given to the Court whatsoever as to what happened
8 to the \$6,000 that was withdrawn three months prior to the
9 search warrant being executed is troublesome to the Court.
10 It may well be that that money was kept there as a cover for
11 illegal gambling activities. It may be that it was lawful.
12 But there is no explanation that I have as to why that money
13 was drawn out and \$30,000 of it was kept three months later
14 in these most suspicious locations.

15 MR. MEDINA: May I be heard, your Honor.

16 THE COURT: I am just giving you my decision.

17 I think it was incumbent upon the defendant,
18 consistent with its burden of proof, to offer something more
19 than the fact that there was \$6,000 of lawful moneys that
20 were initially placed in a bank account. I don't understand
21 why people would take all that money out, why three months
22 later there would be \$30,000 that would be found in a garment
23 bag. All of that is counterintuitive to the Court in terms
24 of being able to conclude that the defendant sustained his
25 burden of proving to the Court in the face of this particular

1 motion that these moneys conclusively did not constitute
2 contraband. That is the problem I have with the case.

3 Mr. Bondi did not have to testify. That was his
4 right. I needed something more than the fact that three
5 months prior there were lawful funds put in a bank. I don't
6 have that. That is really what ultimately has triggered my
7 decision that you haven't met your burden of proof.

8 When it comes to dealing arguably with a forfeiture
9 scenario, there the burden shifts to the government. If the
10 government wanted to have that money deemed to be forfeited
11 funds, it would have to go forward and satisfy the Court that
12 indeed they should be forfeited. I think these shifting
13 burdens really make all the difference in the world for
14 resources out.

15 Let me explain. I was concerned about what
16 possible res judicata the collateral consequences with
17 respect to any future issues such as forfeiture might be
18 triggered by the Court's decision. I haven't been able to
19 locate any case law dealing with that particular issue. If
20 there is going to be a future forfeiture proceeding, the
21 determination on Bondi's current motions will have no
22 controlling effect over such a forfeiture proceeding.

23 I thought I ought to make that clear. They don't
24 preclude any argument in the future that the Court has
25 already ruled this is contraband and therefore it is

1 automatically.

2 I think the circuit's recent decision in United
3 States v. U.S. Currency in the amount of \$119,984 at 304 Fed.
4 165 rendered this year, 2002, makes it clear that there are
5 separate burdens and separate processes that the parties
6 would be able to avail themselves of. There would be the
7 opportunity to have discovery in both sides and the
8 government would be able to go forward if it chooses to do so
9 to claim that indeed these funds should be forfeited. We are
10 not dealing with that here today.

11 It may well be that they won't be able to sustain
12 that burden and the money will go back to you, to your
13 client, at that time.

14 That is basically my take. That's my decision in
15 denying the motion.

16 If you wish to say something on the record, I will
17 give you the opportunity.

18 MR. MEDINA: Absolutely, your Honor. It was my
19 reading of Rule 41 (e) and your Honor reading of 41 (E) when
20 we had the hearing that a 41 (e) proceeding for the return of
21 property post-indictment shall be treated also as a motion to
22 suppress under Rule 12. Your Honor ruled that based upon
23 that, this was now a motion to suppress under Rule 12 where
24 it was the government's burden of proof to demonstrate that
25 these particular proceeds were the specific proceeds of a

1 crime, that they were in fact -- that these particular --

2 THE COURT: I may have said that but I come to the
3 conclusion that the burden is here upon you and I may be
4 wrong about that but that's my take.

5 What do you think Mr. Genser, am I right?

6 MR. MEDINA: If I could just be heard. I
7 understand what your Honor is saying. That's what your Honor
8 ruling was before the hearing and that was the parameters of
9 the hearing. That is what we based that on and that's how we
10 cross-examine the witness and that's how we presented our
11 case. It is one thing to say these are the rules of the
12 game, this is the burden of proof is now on the defense.

13 THE COURT: I reconsider. I will reconsider my
14 decision.

15 What do you say, Mr. Genser?

16 MR. GENSER: Judge, I have to say that the motion
17 should be as a motion to suppress where the burden is on the
18 government, I don't think even if we accepted that as true
19 and as the applicable standard, I don't think it changes the
20 outcome here.

21 A suppression motion attacks the legality of the
22 seizure. All the government would need to do to sustain its
23 burden on the motion to suppress would be to prove the
24 warrant was properly executed lawfully and that the
25 contraband, there was probable cause at the time to believe

1 that the evidence appeared to be contraband.

2 Nothing that your Honor has said or that Mr. Medina
3 has said would suggest that the government failed to meet
4 that burden. There is no additional burden in a suppression
5 motion for the government to prove specifically that the
6 money is forfeitable.

7 MR. MEDINA: We are not talking about forfeiture.
8 We are talking about identifying that as contraband. That
9 was the focus of the hearing. That's what your Honor took
10 evidence on.

11 THE COURT: I do recall now maybe I did say that
12 the burden is upon the government.

13 I will have to reconsider my decision if that is
14 the case.

15 MR. MEDINA: That is the case. It is stated here
16 in the minutes.

17 THE COURT: That's what I told my law clerk. I
18 have to decide who decides who has the burden under this
19 particular statute.

20 I thought we had it down right. Maybe not.

21 MR. MEDINA: If I could read.

22 "Now my understanding of the way things should
23 proceed, Mr. Medina, certainly a motion can be made by the
24 defendant for the return of property that the government has
25 in its possession. The motion is governed by Rule 41 (e) of

1 the Federal Rules of Criminal Procedure. I take it that you
2 folks have looked at that. The sense that this is to be
3 treated as a motion to suppress under Rule 12 that is
4 specifically referenced in 41 (e), that places the burden on
5 the government to support the retention of the property. Is
6 that right, Mr. Wail (ph)?

7 "Mr. Wail: Yes, judge."

8 That's how we proceeded, judge. That's the burden
9 of proof that I was going under, your Honor.

10 THE COURT: I will reconsider my decision in light
11 of that.

12 Thank you for calling that to my attention. We'll
13 see what goes on in the future when I come to peace with that
14 issue.

15 MR. MEDINA: Thank you, your Honor.

16 MR. GENSER: Thank you, judge.

17 THE COURT: If you want to submit anything at all
18 dealing with the burden of proof, I don't have any specifics
19 in front of me as to what the law is in that respect. We
20 have this peculiar intersection between 41 and 12 here and
21 that's what troubles me.

22 MR. GENSER: Your Honor, I would just suggest that
23 on the record that your Honor has recited the government did,
24 even assuming that there was an extra burden on the
25 government to prove that the funds were specifically

1 forfeitable, that we've satisfied it and I would query
2 whether Mr. Medina wants to make a proffer as to whether
3 there would be some additional evidence he would have liked
4 to submit if it turns out that your Honor ends up deciding
5 that the burden was on him. What is there that we're all
6 missing?

7 That might help us all to figure it out and get to
8 the bottom.

9 THE COURT: Do you want to say something else?

10 MR. MEDINA: Your Honor, we had a hearing. We made
11 a record based on what your Honor's ruling was, what the
12 burden of proof of was. I think Rule 41 (e) is very clear --

13 THE COURT: I am going to deny this.

14 I am going to say now on the record that even if I
15 am wrong and the burden is on the government, based upon the
16 findings that I have made, the government has satisfied its
17 burden.

18 You are not going to get the money back now.

19 MR. MEDINA: Your Honor, based upon the fact that
20 your Honor has made a finding that the standard of proof was
21 on me --

22 THE COURT: I am saying that in any event, I will
23 render the same --

24 MR. MEDINA: In the interests of fairness, when I
25 am litigating a hearing and I am told that the burden is on

1 the government, and now your Honor is saying the burden was
2 on me, I respectfully request an opportunity to reopen the
3 hearing because I never had an opportunity to properly
4 address the burden of proof.

5 THE COURT: Let me ask you this. I have a lot of
6 things to do here.

7 If I am now saying even if the burden is on the
8 government, which is what you were appropriately apprised was
9 my initial determination, that the government has sustained
10 its burden under these facts that I have mentioned. The
11 highly suspicious nature of these funds, the tape that I
12 listened to, the fact that these moneys were taken out, that
13 there is reference here that he's got a very good excuse for
14 the money, whatever that statement was all about, again, I
15 think it supports the government's burden. I am not going to
16 go beyond this.

17 MR. MEDINA: If I could address those. The fact
18 money was taken out that the government and Court has
19 acknowledged was legitimate money in the bank, judge, the way
20 it was taken out is clearly irrelevant.

21 THE COURT: I don't agree. You have my decision.
22 I'm sorry for the confusion I may have caused, but in any
23 event, that's my decision.

24 MR. MEDINA: Thank you.

25 MS. JESTIN: Have a nice weekend, judge.

MR. GENSER: Thank you, judge.

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